APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED FEBRUARY 13, 2003

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-5805/
6089/6361/6362

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. MCGINNIS,

Plaintiffs-Appellants/
Cross-Appellees
(00-5805/6089),
Plaintiffs-Appellees/
Cross-Appellants
(00-6361/6362),

v.

BRUCE CURETON, Chief, in his individual and official capacities; VICTOR ASHE, Mayor, in his individual and official capacities; CITY OF KNOXVILLE,

Defendants-Appellees/
Cross-Appellants
(00-5805/6089),
Defendants-Appellants/
Cross-Appellees
(00-6361/6362),

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ROBERT PRESSLEY, Deputy Fire Chief, in his individual and official capacities,

Defendant-Appellee
(00-5805),
Defendant (00-6089),
Defendant/Cross-Appellee
(00-6361/6362).

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 96-00916—Robert P. Murrian, Magistrate Judge

Argued: June 19, 2002

Decided and Filed: February 13, 2003

Before: NORRIS and BATCHELDER, Circuit Judges;
FORESTER, Chief District Judge.*

* * *

OPINION

FORESTER, Chief District Judge. Immediately after being re-elected as Mayor of Knoxville, Tennessee, in September, 1995, Victor Ashe ordered Bruce Cureton, Fire Chief of the City of Knoxville, to transfer five Knoxville Fire Department firefighters to undesirable locations,

* The Honorable Karl S. Forester, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

ostensibly in retaliation for the firefighters' support of Ashe's opponent in the election. When these firefighters, Gary Sharpe ("Sharpe"), William Potter ("W. Potter"), Kenneth Scarbrough ("Scarbrough"), Frank Potter ("F. Potter"), and William McGinnis ("McGinnis"), were denied merit and bonus pay for 1995 and 1996, they filed this action pursuant to 42 U.S.C. § 1983. Plaintiff W. Potter added a claim alleging that he was transferred by the City of Knoxville in an effort to circumvent overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et. seq.*

The jury awarded the plaintiffs a total of $30,645 in damages, but this amount was reduced when the district court ruled as a matter of law that recovery for the plaintiffs' retaliatory transfers was barred by the statute of limitations because the continuing violation doctrine did not apply. The district court also made the following rulings: it held that Offers of Judgment made by the defendants pursuant to Fed. R. Civ. P. 68 were unenforceable because they were void for vagueness; it enjoined Ashe from retaliating not only against the plaintiffs, but against other Knoxville Fire Department employees; it denied W. Potter's FLSA claim; and it granted the plaintiffs only a portion of the attorney fees they requested. The plaintiffs appeal the district court's Judgment as a Matter of Law against their transfer claims, the reduction of their attorney fees, and the dismissal of the FLSA claim, and they request this Court to take notice of post-judgment facts. The defendants cross-appeal the grant of the injunction and the holding that the Rule 68 offers were invalid.

Appendix A

I. FACTUAL AND PROCEDURAL BACKGROUND

W. Potter became a member of the Knoxville Fire Department ("KFD") in 1956, and by September of 1995 had advanced to the position of Administrative Deputy Chief of Firefighting.

Scarbrough joined the KFD in 1967, and by September, 1995, served as a fire officer at a north Knoxville station located conveniently near his home.

F. Potter (a younger brother of W. Potter) joined the KFD in 1972, and by September, 1995, served as assistant chief for a district in east Knoxville.

McGinnis joined the KFD in 1960, and by September 1995 served as an assistant chief for a district in west Knoxville.

In a 1995 Knoxville mayoral race between incumbent Mayor Victor Ashe and challenger Ivan Harmon, W. Potter and the other plaintiffs openly supported Harmon, with the exception of plaintiff McGinnis who remained politically neutral. Ashe ultimately won the September 26, 1995, election, and shortly thereafter transferred all of the plaintiffs from their positions except for Sharpe.

On September 26, W. Potter received a letter delivered by Chief Cureton, informing him that he was being transferred from the administrative offices to the main fire hall, where he would no longer have access to a city car, and his new job would encompass evaluating fire and emergency

service responses, tasks for which he was unfamiliar and did not feel qualified to undertake. W. Potter was assigned an office at the new location that was formerly used primarily as a storage closet and remained in disrepair. W. Potter worked at this location until February 1996, when he was transferred to become a shift chief, a position at which his hours per week were increased from 40 to 56.

Scarbrough was also informed of his transfer on September 26 when he was told that he should report the next morning to an unfamiliar station in south Knoxville. Scarbrough testified that the transfer damaged his performance because it is important for firefighters to be familiar with the territory they protect.

F. Potter learned on September 25 that he would be transferred to a station in north Knoxville effective September 26. F. Potter and Ashe had been friends, but the evidence indicated that F. Potter had deceived Ashe by voicing his political support, but appearing at a Harmon fundraiser. F. Potter spent four months at the north Knoxville location before being transferred to west Knoxville. He testified that the transfers to unfamiliar locations had an immediate impact on his performance.

McGinnis similarly learned of his transfer on September 25 and testified that being in the unfamiliar territory was humiliating and damaged his performance.

On October 2, 1995, all four officers filed grievances with the Knoxville Civil Service Merit Board alleging that their transfers were in retaliation for the exercise of First

Amendment rights. A stay was ultimately entered and the grievances were not resolved.[1]

In August 1996, Ashe moved F. Potter, Scarbrough, and McGinnis back to their original locations, and McGinnis retired in 1997. In October, 1997, F. Potter was moved back to a forty hour per week position that he continues to hold. This position includes an office comparable to his former office, and allows access to a city vehicle, but involves working a swing shift.

In early 1996, the KFD announced its merit pay awards for 1995. Cureton controlled the merit pay decisions, and neither the plaintiffs nor any other KFD member who supported Harmon received merit pay. The firefighters were again denied merit pay for 1996 and appealed this denial; but Cureton sent them letters stating that the KFD could not respond because merit pay was an issue in litigation. McGinnis testified that at Cureton's deposition, Cureton indicated that none of the firefighters were even considered for merit pay in 1996. The KFD abandoned its merit pay policy after 1996.

On October 24, 1996, the firefighters filed this action in federal district court pursuant to 42 U.S.C. § 1983, alleging that defendants Bruce Cureton, Victor Ashe, Robert Pressley, and the City of Knoxville conspired, through discrimination and retaliation, to violate the firefighters' First Amendment rights of political belief and association. The plaintiffs sought front and back pay, compensatory, nominal, and punitive

1. The evidence remains disputed as to which party brought about the stay of the grievance proceedings.

damages, as well as an injunction, attorney fees, and taxation of costs. In addition, W. Potter sought damages under the FLSA and reinstatement to his prior KFD position; Sharpe also sought a promotion.

On January 7, 1997, the plaintiffs amended their complaint to allege two additional retaliatory acts that occurred since the initial complaint, namely, that Cureton had denied their requests for merit and bonus pay increases for 1996, and Ashe refused to consider a reasonable request to modify their pension plans. The individual defendants moved for summary judgment on qualified immunity grounds; however, the district court denied the motion and this Court affirmed the lower court's decision on interlocutory appeal. *See Sharpe v. Cureton,* 1999 U.S.App. LEXIS 531 (6th Cir. Jan. 13, 1999). The defendants' petition for writ of *certiorari* was denied. *See Cureton v. Sharpe,* 528 U.S. 812 (1999).

A jury trial commenced on January 31, 2000, with the jury returning the following verdicts: Sharpe was awarded $2,500 in compensatory damages because Cureton and Ashe had retaliated against him for filing the complaint; however, he suffered no pre-complaint discrimination; W. Potter was found to have not suffered pre-complaint discrimination, but was awarded $6,500 in compensatory damages from Cureton and Ashe due to retaliation for filing the complaint; Scarbrough was awarded $6,500 in compensatory damages because Cureton and Ashe transferred him and denied a merit pay increase in retaliation for exercising his First Amendment rights, and the jury also found that Cureton retaliated against him for filing the complaint; F. Potter was awarded $7,500

in compensatory damages because Ashe transferred him in 1995 for retaliatory reasons, and Cureton and Ashe also retaliated against him for filing the complaint and denying a merit pay increase; finally, McGinnis was awarded $7,645 due to Cureton and Ashe's retaliation for filing the complaint and in transferring him for retaliatory reasons.

Additional evidence indicated that Ashe was observed crossing out the names of potential new KFD hires recommended by a committee and explained his actions by stating that the crossed-out names were the sons of firemen who had not done much for him during a recent election. In addition, evidence indicated that Ashe had adjusted a promotion committee's 1988 recommendations so that they would promote those who had supported him. Fireman Cummins had supported Ashe in the 1988 election, and the next year was promoted to be a deputy chief, but in 1991 Cummins supported Ashe's competitor and was not promoted thereafter. In 1995, Cummins supported Harmon and was afterwards demoted to his former position and was refused a tuition reimbursement.

The defendants filed motions before, during, and at the close of trial for judgment as a matter of law on the transfer claims due to the statute of limitations. The district court denied the defendants' motions and submitted the statute of limitations issue to the jury, and a finding was reached that the claim was not barred. On February 16, 2000, the court entered judgment enforcing the jury's findings that Cureton and Ashe were liable in their individual capacities and that

the City of Knoxville was liable only for the merit pay portion of Scarbrough and F. Potter's claims.[2]

After the Court's February 16 judgment, the plaintiffs filed a Rule 59(e) motion to alter or amend the judgment to call to the Court's attention that a ruling was still needed on W. Potter's FLSA claim. The plaintiffs also requested in this motion front pay, an injunction against future retaliation and discrimination, and a request for prejudgment interest. A hearing was held on March 28, 2000, and in an April 25, 2000, memorandum opinion, the district court denied the FLSA claim, as well as the request for front pay, an injunction, and prejudgment interest. Also in the court's April 25 opinion, it granted the defendants' renewed motion for a judgment as a matter of law on the transfer claims by finding that the statute of limitations barred these claims because the "continuing violation" doctrine did not apply. Consequently, Scarbrough's damages were reduced to $3,250; F. Potter's damages were reduced to $3,750, and McGinnis ultimately received $1 in nominal damages. On June 5, 2000, the firefighters filed a notice of appeal of the district court's May 8 judgment.[3]

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2. The jury returned a special verdict that allocated damages as follows: Scarbrough received $3,250 for the transfer and $3,250 for the denial of merit pay; F. Potter received $3,750 for each retaliatory action; and McGinnis' entire award of $7,645 was for the illegal transfer.

3. The district court inadvertently failed to enter judgment separately in accordance with Fed.R.Civ.P. 58 on April 25, leading to the judgment issued on May 8, 2000.

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Also after the district court's February 16, 2000, entry of judgment, the defendants filed a motion to tax Sharpe, W. Potter, and Scarbrough the costs of the action incurred by the defendants after December 6, 1996, because these plaintiffs rejected the defendants' Rule 68 offer made on that day that turned out to be larger than the respective jury awards. In addition, the defendants requested that the court award costs incurred by them since November 4, 1997, the date of the Second Rule 68 Offer, and that the court award all of Pressley's costs at the expense of all the firefighters. After the court's decision to grant the defendants' motion for judgment as a matter of law reducing the jury awards, the defendants amended their motion for taxation of costs to request that Scarbrough and F. Potter be made liable for costs after December 6, 1996, since the Rule 68 offer made on that day turned out to be larger than the reduced verdict. On May 8, 2000, the court granted the defendants' requests for taxation of costs and the plaintiffs appeal this decision.

On May 22, 2000, the firefighters filed a second motion to alter or amend the judgment, requesting the district court to reconsider its findings regarding the statute of limitations, the need for an injunction, the dismissal of the FLSA claim, as well as the prejudgment interest and grant of taxation of costs. In a July 26, 2000, memorandum, the district court denied the motion in all respects, except for amending the prior judgment to grant the firefighters' request for an injunction, and to revoke the taxation of defendants' costs under Rule 68. The defendants appeal this Order granting an injunction against future political retaliation by Ashe, and the award to the firefighters of costs against the defendants as "prevailing parties."

Next, on August 8, 2000, the firefighters filed a motion to recover attorney fees in the amount of $365,716, later supplemented to reflect an additional $7,228 in fees incurred since the motion was filed. The district court granted the firefighters' request in part, reducing the total fee award to $241,287. In this Order, appealed by both sides, the district court also reaffirmed its grant of an injunction, and upheld the earlier ruling refusing to impose the defendants' costs on the firefighters pursuant to Rule 68.

Finally, on April 8, 2002, the firefighters filed a motion requesting this Court to consider new facts that had allegedly taken place. Specifically, the firefighters request the Court to consider the results of a grievance filed by a non-plaintiff employee of the Knoxville Fire Department, who complained that the City of Knoxville had discriminated against him in violation of his First Amendment rights of political belief and association.

II. FIREFIGHTERS' APPEAL[4]

A. District Court's Finding That The Continuing Violations Doctrine Does Not Apply To The Transfer Claims

We review the district court's grant of the defendants' motion for judgment as a matter of law *de novo,* applying

4. The defendants' argument that the firefighters' appeal is untimely is rejected because orders or judgments establish the time for filing motions or an appeal, not memorandum opinions. Fed. R. Civ. P. 54(a); Fed. R. App. P. 4(a)(1)(A); *Associated Press v. Taft-Ingalls Corp.*, 323 F.2d 114, 115 (6th Cir. 1963).

the same standard that the district court applied: a court should grant the motion only if "in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595, 598 (6th Cir. 2001).

As an initial matter, the duration of the statute of limitations for § 1983 actions is governed by state law; however, federal standards govern when the statute begins to run. *See Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir.1986). Tennessee law provides for a one year statute of limitations for § 1983 actions. *See* Tenn. Code Ann. § 28-3-104(a)(3); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986).

The discriminatory transfers that are the subject of this appeal occurred in September 1995, but the plaintiffs did not file suit until October 24, 1996. Ordinarily, the "discovery rule" applies to establish the date on which the statute of limitations begins to run, *i.e.*, the date when the plaintiff knew or through the exercise of reasonable diligence should have known of the injury that forms the basis of his action. *Sevier*, 742 F.2d at 273. This test is an objective one, and the Court determines "what event should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991).[5]

5. In the Title VII context, the Supreme Court has recently noted, without resolving, the accrual issue, specifically, "whether the time begins to run when the injury occurs as opposed to when the injury (Cont'd)

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The district court properly concluded that reasonable minds could not differ that the firefighters had reason to know of the injuries caused by their transfers more than a year before they filed suit. The fact that the firefighters were alerted to the need to protect their rights is evidenced by the October 2, 1995, grievances filed by the firefighters with the Knoxville Civil Service Merit Board, alleging that the transfers were in retaliation for the exercise of First Amendment rights. Accordingly, the district court held that the firefighters' transfer claims were barred due to the fact that the statute of limitations was triggered more than a year preceding the October 24, 1996, date of the lawsuit.

In an effort to sidestep the one year Tennessee statute of limitations, the plaintiffs argue for application of the "continuing violation" doctrine in such a way as to toll the limitations period, rendering the transfer claims timely. The Sixth Circuit has previously recognized two distinct categories of continuing violations, namely, those alleging serial violations and those identified with a longstanding and demonstrable policy of discrimination. *Compare Haithcock v. Frank,* 958 F.2d 671 (6th Cir. 1992) *with Alexander v. Local 496, Laborers' Int'l Union of North America,* 177 F.3d 394 (6th Cir. 1999). Recent Sixth Circuit law summarizes the two categories as follows:

> The first category arises where there is some evidence of present discriminatory activity giving

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reasonably should have been discovered." *National Railroad Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2073 n.7 (2002). Here, even pursuant to the discovery rule, the plaintiffs' transfer claims remain time-barred.

> rise to a claim of continuing violation such as where an employer continues to presently imposes [sic] disparate work assignments or gives unequal pay for equal work. . . . The second category of continuing violation arises where there has occurred a long-standing and demonstrable policy of discrimination. This requires a showing by a preponderance of the evidence that some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure.

Burzynski v. Cohen, 264 F.3d 611, 618 (6th Cir. 2001) (internal quotations and citations omitted).

This Circuit employs the continuing violations doctrine most commonly in Title VII cases, and rarely extends it to § 1983 actions. *See, e.g., LRL Properties v. Portage Metro Hous. Auth.,* 55 F.3d 1097, 1106 n.3 (6th Cir. 1995). When a continuing violation is found, "a plaintiff is entitled to have the court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Alexander,* 177 F.3d at 408 (quoting *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 713 (2d Cir. 1996)). The firefighters submit several post-transfer allegedly discriminatory actions as evidence of a continuing violation, specifically, the denial of merit pay (announced in 1996), the refusal to consider plaintiffs for merit pay in 1996, and Ashe's refusal to return the firefighters to their preferred locations.

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Previous "continuing violation" law must be reexamined in light of the Supreme Court's recently imposed limits on the viability of the doctrine. In *National Railroad Passenger Corp. v. Morgan,* 122 S.Ct. 2061, 2070 (2002), the Court held that when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the filing period. *Id.* at 2072. According to the Supreme Court, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* In contrast, hostile environment claims involve unlawful employment practices that cannot be said to occur on any particular day, but occur over a series of days or years. *Id.* (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993)).

Morgan explained, in direct language:

> [D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the

> acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 2072.

We can find no principled basis upon which to restrict *Morgan* to Title VII claims, and we therefore conclude that the Supreme Court's reasoning must be applied to the firefighter's § 1983 claims.[6] The Supreme Court has previously determined that the Title VII administrative charge period is functionally equivalent to a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-95, (1982). We are unable to find that the policy justifications for Tennessee's legislative choice to establish a one year statute of limitations period as applicable to § 1983 claims are any less important than the congressional directive set forth in 42 U.S.C. § 2000e-5(e)(1), requiring the prompt filing of Title VII claims.[7] *See Hargraves v. Brackett Stripping*

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6. This Circuit has recently found *Morgan's* construction of the continuing violation doctrine equally applicable to claims of age discrimination and retaliation brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq. See Sherman v. Chrysler Corp.*, No. 00-2287, 2002 WL 31074591 (6th Cir. Sept. 6, 2002). Similarly, a district court in this Circuit recently held that *Morgan* likewise applies to continuing violation claims under 42 U.S.C. § 1981. *See Kinley v. Norfolk Southern Railway Co.*, No. Civ. A. 1999-130, 2002 WL 31499269 (E.D. Ky. Sept. 26, 2002).

7. "[S]trict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Morgan*, 122 S.Ct. at 2070 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Strict adherence to the procedural

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Machine Co., Inc., 317 F. Supp. 676, 683 (E.D. Tenn. 1970) (holding that the one-year Tennessee statute of limitations does not violate the Due Process Clause as arbitrary and capricious). Moreover, the continuing violation doctrine arose in the context of the "obviously quite short deadlines"[8] set forth in Title VII, and the relatively longer limitations periods provided by states for § 1983 actions reinforces as a policy matter *Morgan's* applicability to these claims.[9] *See Wilson*, 471 U.S. at 279 ("It is most unlikely that the period of limitations applicable to [§ 1983 claims] ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.").

It cannot reasonably be disputed that the firefighters' claims involve discrete acts and not a hostile environment, as they were made aware of the retaliatory transfers on

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requirements specified by the Tennessee legislature similarly guarantees evenhanded administration of the law. *See Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 523 (6th Cir. 1997) ("To allow damages for the entire period during which a law is in effect when a plaintiff challenges the law long after it was enacted would frustrate [the purposes of the statute of limitations]. Instead, just as a new injury was allegedly inflicted on [the plaintiff] each day that [the offending law] was in effect, a new limitations period began to run each day as to that day's damage.") (citation omitted).

8. *Morgan*, 122 S.Ct. at 2070 (citing *Mohasco*, 447 U.S. at 825).

9. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 56 (1986).

specific dates in September 1995. The serial violations component of the continuing violations doctrine employed by this Court is sufficiently analogous to the Ninth Circuit line of cases struck down in *Morgan. Tenenbaum v. Caldera,* Nos. 00-2394, 01-1704, 2002 WL 2026347, at *3 (6th Cir. Aug. 29, 2002). Accordingly, *Morgan* overturns prior Sixth Circuit law addressing serial violations, *i.e.,* plaintiffs are now precluded from establishing a continuing violation exception by proof that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period.

The second category of continuing violations, involving a longstanding and demonstrable policy of discrimination, is not implicated by *Morgan. Tenenbaum,* 2002 WL 2026347, at *2 n.3. To establish this category of continuing violation, "appellant must demonstrate something more than the existence of discriminatory treatment in his case." *Haithcock,* 958 F.2d at 679 (citing a discriminatory policy appearing in a statute or an affirmative action plan as examples of this second category). "The preponderance of the evidence must establish that some form of intentional discrimination against the class of which plaintiff was a member was the company's standing operating procedure." *EEOC v. Penton Indus. Publishing Co.,* 851 F.2d 835, 838 (6th Cir. 1988) (citations omitted). Here, the plaintiffs do not represent a class, and have otherwise failed to allege class-wide discriminatory action.[10] The plaintiffs broadly allege, "Ashe's disregard to constitutional rights spans three decades impacting more than these plaintiffs. . . ." This allegation is not sufficiently supported by the record. Knoxville consistently employs over

10. *See infra,* section III. A. (discussing the injunction).

300 firefighters and over 1600 total city employees, but plaintiffs called at trial merely one other retired firefighter who testified concerning allegations of patronage practices occurring in the late 1980's. This proof is insufficient as a matter of law for plaintiffs to meet their burden of showing a three-decade-long "standing operating procedure" of discrimination. Instead, the plaintiffs proved the existence of discriminatory treatment in their case, but this is inadequate to invoke the "longstanding and demonstrable policy of discrimination" continuing violation exception.[11]

Accordingly, we affirm the district court's finding that the continuing violation doctrine does not apply, although based upon the different reasons stated above.

B. W. Potter's FLSA Claim

We review the district court's factual findings regarding this claim against the City of Knoxville for clear error, and its findings of law *de novo*. *Brock v. City of Cincinnati*, 236 F.3d 793, 800 (6th Cir.2001). The FLSA became applicable to the Knoxville Fire Department in April, 1996, and since that time each uniformed member of the Knoxville Fire Department has been compensated by payment of an annual base salary paid in equal bi-weekly installments, and an hourly rate of pay is derived for purposes of determining the regular rate of pay used in computing overtime compensation.

11. As the plaintiffs have declined to argue equitable tolling or estoppel either before or after the announcement of *Morgan*, we have no reason to consider whether *Morgan's* limited endorsement of these equitable doctrines extend to the § 1983 context. *See Morgan*, 122 S.Ct. at 2072 (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984)) (per curiam).

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In April 1996, W. Potter was a Deputy Chief in the firefighting division and worked an average of 56 hours a week. In his shift schedule he worked a maximum of ten and a minimum of nine 24-hour shifts in a 28-day work period. During this time, the Fire Department calculated his hourly rate for purposes of overtime by taking his annual salary and dividing that by 26 (since he was paid bi-weekly), to derive a bi-weekly amount. The bi-weekly amount was then divided by the total number of scheduled hours of work in the bi-weekly pay period. Based upon these calculations, when W. Potter worked ten twenty-four hour shifts, his bi-weekly average was 120 hours, and when he worked nine twenty-four hour shifts, his bi-weekly average was 108 hours.

In September of 1987, W. Potter was transferred to the administrative division and became a Deputy Chief there, working 40 hours per week, and not working any overtime. On September 26, 1995, he was transferred to a new position at which he continued to work 40 hours per week, receiving the same base salary as before, an effective hourly rate of $21.25 per hour. On February 1, 1996, he was transferred to become a shift chief in the firefighting division, which essentially involved reassuming his 1986 position. In this position, he retained his same annual base salary, and his overtime was calculated in the same method as it had been in 1986. This meant that when he worked ten 24-hour shifts his hourly rate for overtime was $15.74, averaging out to $15.18.[12]

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12. When W. Potter first moved to this Shift Chief position, the Fire Department did not pay him any overtime, and instead simply paid him the same salary he had received as an administrator without

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The Fire Department typically determines the number of hours worked for purposes of computing overtime compensation by applying section 207(k) of the FLSA, which exempts fire departments from overtime compensation until the number of hours worked exceeds 212 hours in each 28-day work period. 29 U.S.C. § 207(k). The Fire Department chose not to apply the Section 207(k) exemption to W. Potter when it paid him overtime as Shift Chief; instead, it paid him time-and-a-half at the $15.18 rate for all hours he worked over 40. The result was that W. Potter made more money than the other two Deputy Chiefs who had identical duties. For example, Deputy Chief Palmer was paid $86,645 during the same period that W. Potter was paid $106,674.[13]

W. Potter argues that the Fire Department should have applied the Section 207(k) exemption, and that this would have resulted in a higher hourly rate. According to the Fire Department's method, his bi-weekly base salary was divided by the average number of hours he worked in each bi-weekly period (160), thus arriving at a $15.18 regular rate, plus 64 hours at the time-and-half rate of $22.77, resulting in a total pay per cycle of $3,886.08. In contrast, W. Potter's method calls for dividing his bi-weekly base salary by 80 hours per week, thus arriving at a $21.25 regular rate for 212 regular

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any enhancement. In April, 1996, the Fire Department corrected this error by paying him time-and-a-half for all overtime (based on the $15.18 rate), including a lump sum of back pay overtime beginning February 1, when he had moved into the position.

13. The Fire Department transferred W. Potter back to a 40-hour job in October, 1997.

hours, plus 12 hours at the time-and-a-half rate of $31.88, resulting in pay each cycle of $4,887.56.

The FLSA establishes that employers cannot make employees work more than a specified number of hours per week "unless such employee receives compensation for his employment in excess of [40 hours, unless otherwise provided for,] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). "Regular rate" is a term of art under the FLSA, defined as:

> The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co. v. Aaron,* 334 U.S. 446 [(1948)]). The Supreme Court has described it as the hourly rate actually paid the employee for the normal non-overtime workweek for which he is employed-an "actual fact." (citation omitted).

29 C.F.R. § 778.108; *see also 149 Madison Ave. Corp. v. Asselta,* 331 U.S. 199, 204 (1947).

The method of calculating the regular rate is as follows: "[t]he 'regular rate' under the Act is a rate per hour," though "[t]he Act does not require employers to compensate employees on an hourly rate basis. . . ." *Id.* § 778.109. "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment . . . in

any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." *Id.* "Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. . . . A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52." *Id.* § 778.13(b). After calculating the workweek equivalent, the employee's "regular hourly rate of pay, on which time-and-half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate." *Id.* § 778.113(a). Importantly, the "number of hours which the salary is intended to compensate" does not have to be 40 hours; instead, this is a number that is determined by the parties' actual practice. *See, e.g., id.* § 778.325 (providing an example of an acceptable scheme, in which an employee was hired at a fixed salary of $275 for 55 hours of work and his regular rate for purposes of overtime was $5 per hour–indicating that the divisor was 55 rather than 40).[14]

W. Potter's argument is legally indistinguishable from other firefighters' arguments rejected in *Aaron v. City of*

14. *See also 149 Madison Ave. Corp.*, 331 U.S. at 204 ("Section 7(a) of the Act requires . . . that any wage agreement falling within its purview must establish an hourly 'regular rate' not less than the statutory minimum and provide for overtime payments of at least one and one-half times the 'regular rate.' A wage plan is not rendered invalid simply because, instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom.").

Wichita, 54 F.3d 652 (10th Cir. 1995). In *Aaron,* the firefighters worked an average of 56 hours per week, or 112 hours bi-weekly, and though they were paid based on the number of hours they worked, the hourly rate was based on a designated "base salary" established in a collectively bargained Memorandums of Agreements ("MOAs"). The MOAs contained pay schedules indicating both bi-weekly salaries and hourly rates, the latter computed on the assumption that the bi-weekly salaries were intended to compensate 112 hours. The *Aaron* firefighters argued that the bi-weekly salary was intended to compensate 80 hours, but the City maintained that the MOAs' practice of using 112 hours to calculate the regular rate was in compliance with the FLSA.

The district court in *Aaron* held that the City's method was wrong, "because overtime hours could not be used in calculating the regular rate. *Id.* at 655. The Tenth Circuit held, however, that "[t]his interpretation is clearly inconsistent with FLSA regulations," " because "[t]he regulations provide that a base salary used to calculate a regular rate can be intended to cover more than 40 hours in one week and the regulations illustrate how to deal with the calculation of the regular rate in such a case." *Id.* (citing the example from 29 C.F.R. § 778.325, *supra*). *Aaron* found the City's method correct:

> The bi-weekly salaries found in the MOAs were intended to cover 112 hours of work for each pay period. Therefore, the regular rate consisted of the MOA-designated bi-weekly salary divided by 112. The MOA bi-weekly salary compensated the firefighters at that rate for up to 112 hours of work.

Appendix A

> If a firefighter worked a total of 112 hours, some of those hours would be considered overtime hours, and therefore, the firefighters would also receive one-half the regular rate for each of those hours. Any hours worked over 112 were all overtime hours and the firefighters would be entitled to one and one-half times the regular rate for those hours. This pay scheme is clearly consistent with the FLSA regulations.

Id.

W. Potter's arguments confuse the concepts of overtime premiums with overtime hours. Further, his reliance upon *Knoxville v. Popejoy,* 1991 Tenn. App. LEXIS 996 (Tenn. Ct. App. Dec. 31, 1991) is misplaced because that case involved review of an administrative interpretation of a City Charter provision under the arbitrary and capricious standard, and did not interpret the FLSA. W. Potter has not identified authority indicating that an unconsented transfer to a lower hourly rate is illegal. The record is devoid of evidence indicating that the City of Knoxville reduced W. Potter's pay "so as to nullify the effect of extending the [FLSA's] coverage." *Cf. Blanton v. Murfreesboro,* 856 F.2d 731, 736 (6th Cir. 1988). W. Potter received higher pay due to the City's choice not to utilize the Section 207(k) exemption than he received in his prior position as an administrator. In addition, he received higher pay in the transferred position than other similarly situated firefighters. Thus, any claim by W. Potter that the city discriminated against him with respect to his wages because he asserted coverage under Section 7 of the FLSA is foreclosed.

Based upon the above reasoning, we affirm the district court's denial of the FLSA claim.

III. APPEAL OF CURETON, ASHE AND KNOXVILLE

A. The District Court Injunction

The court below entered an injunction order stating as follows:

> Mayor Ashe is hereby enjoined from taking any adverse employment actions such as transfers, demotions, refusal to hire, refusal to promote, reduction of compensation or refusal to increase compensation of Knoxville Fire Department firefighters on account of their political beliefs and associations or their choice to remain neutral in political matters. This injunction shall not apply, however, to any Knoxville Fire Department employees who are not covered by the city's civil service regulations.

We review the district court's decision to grant an injunction for abuse of discretion; legal conclusions leading to the injunction are reviewed *de novo,* and factual conclusions are reviewed for clear error. *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir. 1998). "Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Id.* (citations omitted).

The district court should grant an injunction only where the dilemma is ripe for judicial resolution, and "a matter is considered premature for judicial review when the alleged injury is speculative or may never occur." *Id.* at 1068 (citations omitted). Finally, the injunction "may be no broader than necessary to remedy the constitutional violation." *Id.* at 1069 (citations omitted).

The district court issued the injunction only after the firefighters filed a motion to alter or amend the court's April 25, 2000, decision to deny the request for an injunction. The court originally denied the request by stating:

> In light of the fact that the plaintiffs are adequately protected by the laws and regulations of the City of Knoxville, that Mayor Ashe cannot serve as mayor beyond his current term, that former chief Bruce Cureton has retired, that Deputy Chief Pressley was found not to have violated any of the plaintiffs' civil rights, that plaintiffs, Frank Potter, Kenneth Scarbrough, and William McGinnis were transferred back to their favored stations in August, 1996 during the pendency of their civil service grievances, that the merit pay system has been discontinued, and that Mayor Ashe has conceded that it was wrong for him to transfer Frank Potter, the undersigned finds that the plaintiffs have not demonstrated a substantial likelihood of future injury for which injunctive relief is warranted.

The court below altered its ruling denying the injunction for the following stated reasons: in order to deter Ashe's

future unconstitutional actions; due to the inadequacy of money damages; that Ashe has refused to admit the unconstitutionality of his actions; that future retaliation would not be grievable before the Civil Service Merit Board; due to evidence that Ashe had been engaging in similar discriminatory behavior from the beginning of his term; and evidence that a firefighter benefitted from political favoritism by a previous administration.

As an initial matter, the injunction grants class-wide relief to all Knoxville firefighters, despite the fact that the firefighters never sought nor received class certification. The injunction is limited to Ashe, over whom the court properly had *in personam* jurisdiction; however, the operative question for review is the extent to which the class-wide injunction burdens Ashe. While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit,* such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *See Califano v. Yamasaki,* 442 U.S. 682, 702 (1979); *Aluminum Workers Int'l Union Local Union No. 215 v. Consol. Aluminum Corp.* 696 F.2d 437, 446 (6th Cir. 1982) ("Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy.")

The injunction issued by the district court is overly broad in that the class wide focus is completely unnecessary to provide the named plaintiffs the relief to which they are

entitled as prevailing parties. *Cf. Brown v. Trustees of Boston University,* 891 F.2d 337-361 (1st Cir. 1989) ("An injunction should be narrowly tailored to give only the relief to which plaintiffs are entitled. Ordinarily, class-wide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class. . . . But there is no such reason here for an injunction running to the benefit of nonparties. Professor Brown's case established that she alone had been the victim of sex discrimination. The only permissible focus of the injunctive relief, therefore, would be on protecting her from further instances of sex discrimination or retaliation. . . .") (citations omitted). Regardless, the non-party class of firefighters established by the language of the injunction have access to the City's grievance process and the right to file suit to remedy any potential future harm without the necessity of an injunction.

The district court's decision to grant the injunction is not based upon a requisite factual showing of likely future irreparable harm. The only post-suit retaliation alleged involved the January 1997, decision not to consider the plaintiffs for merit pay. The defendants consistently maintain that this decision, now made almost six years in the past, was on the advice of counsel due to the pending litigation. In addition, the merit pay system has been abolished in Knoxville since 1997, and there is thus little likelihood of future retaliation by merit pay decisions. The legal arguments of Ashe's counsel do not provide a factual predicate for likely future irreparable harm, nor does Ashe's refusal to issue a post-trial public apology, as the law does not require such a gesture by a defendant in order to avoid an injunction.

The district court correctly emphasized in its initial decision denying the injunction the lack of a substantial likelihood of future injury given that: the firefighters were transferred back to their favored locations; Ashe was prohibited from seeking another term in office (and now has less than one year remaining in his last term), and Cureton is no longer available to carry out any retaliation orders due to his retirement. The district court's initial decision denying the injunction was correct. For the above reasons, the injunction is reversed as overly broad, and unnecessary in any event because the firefighters have failed to establish a sufficient likelihood of future harm, and that any future harm would be irreparable.[15]

B. Defendants' Rule 68 Offers

Federal Rule of Civil Procedure 68 provides, in pertinent part, that "a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after

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15. On the basis of *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 404 (6th Cir. 1992), we deny the firefighters' April 8, 2002, motion requesting the Court to consider certain newly emerged facts not considered by the district court. The firefighters' reliance upon the unpublished opinion of *Van Meter v. Shriver,* 1986 U.S. App. LEXIS 23006 (6th Cir. Feb. 6, 1986) is misplaced because that case involved new facts relating to justiciability and not the substantive merits of the action. *See Van Meter,* at *4 ("this litigation bristles with difficult questions of standing, mootness, ripeness, comity, and federalism.").

the making of the offer." Fed. R. Civ. P. 68. In a § 1983 action, Rule 68 costs include the plaintiff's own attorney fees; thus, when the Rule 68 offer is ultimately greater than the award, the plaintiff may not recover attorney fees from the defendant. *Marek v. Chesny,* 473 U.S. 1, 11 (1985); *Mallory v. Eyrich,* 922 F.2d 1273, 1278 (6th Cir.1991). "Operation of Rule 68 is mandatory," and [t]he district court retains no discretion under Rule 68 to alter the rule's sometimes severe application." *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 295 (6th Cir. 1989).

On December 6, 1996, the defendants made timely Rule 68 offers to each of the firefighters, and the firefighters rejected them. On November 4, 1997, the defendants made second offers to all the firefighters except for W. Potter, and these too were rejected. Only the jury awards in favor of Scarbrough and F. Potter exceeded the sums specified in the offers, and when the district court subsequently eliminated the transfer claim recoveries on statute of limitations grounds, the Rule 68 offers to each individual plaintiff exceeded each individual jury award. The district court then ordered all the firefighters to pay the defendants' costs subsequent to December 6, 1996. After the firefighters filed a second motion to alter or amend the judgment, the district court altered the previous ruling, adopted the firefighters' argument that the offers were void for vagueness, revoked the award of costs, declared the firefighters "prevailing parties" and granted their request for attorney fees.

The plaintiffs attempt to escape the mandatory operation of Rule 68 by arguing that the defendants' offers were void for vagueness and thus incapable of being accepted. Contract

principles apply to Rule 68 offers, and a plaintiff contesting the validity of a Rule 68 offer may assert contractual defenses. *Mallory,* 922 F.2d at 1279. Apparently, due to a dearth of Sixth Circuit law addressing the specificity required for Rule 68 offers, the district court borrowed the basic standard from *Gavoni v. Dobbs House, Inc.,* 164 F.3d 1071, 1075-76 (7th Cir. 1999), which held that "[t]he defendant must show that the offer was more favorable than the judgment and that the mandatory cost-shifting provision was therefore triggered." (citations omitted). Specifically, "[t]here must ... be a clear baseline from which plaintiffs may evaluate the merits of their case relative to the value of the offer." *Id.* at 1076. (citations omitted).

W. Potter's offer was customized for him; the other four offers provided for two-step merit pay increases, and in some cases, promotions with accompanying back-dated pay increases; an agreement not to discriminate in the future; payment of attorney fees and costs to date; and a specified-sum payment for damages.

The district court invalidated the offers in part because actual dollar figures were not provided to the firefighters until after trial. The Fire Planning and Operations Manager of Knoxville calculated the value of the Rule 68 offers to the plaintiffs, if they had accepted them, up to the pay period ending January 29, 2000. The district court found that the pre-trial offers failed to set forth clearly defined terms upon which there could be a meeting of the minds. To buttress this conclusion, the court cited a phone call allegedly made by the firefighters' attorney to one of defendants' attorneys five days after the December 6, 1996, offer of judgment, and

a letter sent to the defendants one day after the November 4, 1997, offer of judgment seeking to discuss the offer.

The firefighters' pleas of ambiguity are a thinly-veiled attempt to avoid the mandatory application of Rule 68 in this case, due to the admittedly severe effect the rule has on plaintiffs' attorney fee award. It is undisputed that under the Knoxville merit pay system that a one-step pay increase results in an increase in the recipient's pay by 2.5%, beginning the day the pay increase becomes effective. The defendants' offer providing for a two-step increase would correspondingly result in a 5% pay increase. The veteran firefighters, having the benefit of years of experience with the Knoxville merit pay system and having received previous step increases throughout their careers, were fully familiar with the pay step system, as reflected in their trial testimony. *See Said v. Virginia Commonwealth University,* 130 F.R.D. 60, 63 (E.D. Va. 1990) (approving use of terms of art commonly known to the parties in the offer of judgment). These offers did not lump together a sum for the plaintiffs to allocate among themselves; instead, separate offers were made to each firefighter, and the offers did not lump together the damages portion with the award of costs. *Cf. Marek,* 473 U.S. at 5-6. Thus, the relative comparisons of the increase among each firefighter is of no moment, as each firefighter could determine his own increase if he accepted the offer.

Likewise, the offer of a promotion is free from ambiguity, and the plaintiffs were well aware that the salary increase would be reflected on their bi-weekly pay check during the duration of their careers, and in their pensions, which reflected 50% of their salary. The 5% pay increase specified

to be effective eleven months earlier than the offer obviously includes "back pay." In addition, the offers made clear that the pay increase was effective on the exact date it became effective for all other firefighters who received the merit pay at issue, January 7, 1996.

The letter from plaintiffs' attorney to defense counsel is more accurately construed as a bargaining tool seeking additional terms, and not a request for clarification.[16] Regardless, the letter tellingly refers to the step increases in similar fashion to the defendants' offer, without mentioning specific dollar amounts or requesting monetary clarification, further revealing the plaintiffs' familiarity with the meaning of such an increase. The district court's conclusion that "[t]he defendants could have refined their offers of proof in response to plaintiffs' inquiries but they did not do so" incorrectly implies that Rule 68 requires the offer to be normatively acceptable to the plaintiff, instead of merely sufficiently clear as to allow the plaintiffs to understand the terms. The letter did not ask for *clarification* of the monetary part of the offers; it merely sought *refinement* of the injunctive part.

As for W. Potter's offer, step increases were not at issue because he was serving at the highest possible step of his rank. The plaintiffs' argument that it was indefinite because it did not specify the rate of pay for the first 40 hours of the

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16. For example, the plaintiffs' letter attempts to alter the language of the defendants' unambiguous offer to not discriminate in the future. Dickering or subjective dissatisfaction with the terms of an offer does not render the offer ambiguous, and cannot alleviate the mandatory operation of Rule 68.

week is not well taken. All uniformed members of the Knoxville Fire Department, including W. Potter, are salaried employees compensated on the basis of an annual base salary paid in bi-weekly installments. The offer further specified the overtime compensation rate in compliance with the Fair Labor Standards Act.

In sum, the defendants' Rule 68 offers are not void for vagueness; the offers were sufficiently definite to create the power of acceptance in the firefighters, triggering the mandatory application of Rule 68. Both the district court, as well as this Court, are without equitable discretion to alter the effect of Rule 68. Accordingly, the district court's award of attorneys' fees is vacated and the matter is remanded for a determination of the plaintiffs' fees reasonably incurred before the offer of judgment on December 6, 1996.[17]

IV. CONCLUSION

For the above reasons, we affirm the district court's finding that the continuing violation doctrine does not apply; affirm the denial of the FLSA claim; vacate the injunction; reverse the Rule 68 decision; vacate the entry of attorney fees; and direct the district court on remand to issue a finding regarding attorney fees reasonably incurred by the plaintiffs' attorneys before December 6, 1996.

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17. The plaintiffs do not dispute that Rule 68 is operable in that the final judgments are less than the amount of the offers.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-5805; 00-6089; 00-6361; 00-6362

GARY G. SHARPE; WILLIAM G. POTTER; KENNETH F. SCARBROUGH; FRANK E. POTTER; WILLIAM H. McGINNIS,

Plaintiffs - Appellants/Cross-Appellees (00-5805/6089),
Plaintiffs - Appellees/Cross-Appellants (00-6361/6362),

v.

BRUCE CURETON, Chief, in his individual and official capacities; VICTOR ASHE, Mayor, in his individual and official capacities; CITY OF KNOXVILLE,

Defendants - Appellees/Cross-Appellants (00-5805/6089),
Defendants - Appellants/Cross-Appellees (00-6361/6362),

ROBERT PRESSLEY, Deputy Fire Chief, in his individual and official capacities,

Defendant - Appellee (00-5805),
Defendant (00-6089),
Defendant - Cross-Appellee (00-6361/6362).

Before: NORRIS and BATCHELDER, Circuit Judges;
FORESTER, Chief District Judge.

Appendix A

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED, accordingly:

1) the district court's finding that the continuing violation doctrine does not apply is AFFIRMED;

2) the district court's denial of the Free Labor Standards Act claim is AFFIRMED;

3) the district court's grant of an injunction is VACATED per abuse of discretion;

4) the district court's decision as to Federal Rule of Civil Procedure 68 is REVERSED;

5) the district court's entry of attorney fees is VACATED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF TENNESSEE DATED AND FILED SEPTEMBER 20, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al.,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al.,

Defendants.

MEMORANDUM OPINION

The plaintiffs are the prevailing parties in this civil rights case and are therefore entitled to costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b).[1] The underlying

1. Section 1988(b) provides, in pertinent part, as follows:

> In any action or proceeding too enforce a provision of section[ ] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

litigation has been complicated, extended and contentious.[2] The plaintiffs, all Knoxville, Tennessee, firefighters or former firefighters, ultimately obtained a compensatory damage award of $16,001 and a permanent injunction against the Mayor of the City of Knoxville enjoining the mayor from discriminating against Knoxville firefighters on account of their political associations.

In keeping with the tenor of the entire lawsuit, the issues surrounding the award of attorneys' fees and costs are complicated, tedious, and contentious.

The following motions and requests are pending:

1. the plaintiffs' motion for attorneys' fees and associated expenses [Doc. 362];

2. the defendants' opposition to the plaintiffs' motion for attorneys' fees and associated expenses and defendants' motion to reconsider the court's July 26, 2000, Memorandum Opinion [Doc. 371];

3. the plaintiffs' motion to strike the affidavit of Robert Crossley [Doc. 372]; and,

4. plaintiffs' bill of costs [Doc. 358].

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2. The undersigned used six verdict forms to ask the jurors 93 questions.

Appendix B

I. *Defendants' Motion to Reconsider the July 26, 2000, Memorandum Opinion*

The defendants seek reconsideration of the undersigned's ruling in the July 26, 2000, Memorandum Opinion to the effect that the Fed. R. Civ. P. 68 offers of judgment are not binding on the plaintiffs. This motion was filed August 29, 2000. It is therefore untimely. This case is on appeal and the defendants had just 10 days in which to file a motion to alter or amend judgment. Fed. R. Civ. P. 59(e).

> Rule 59 provides that motions to reconsider—nowadays correctly styled either motions for new trial or motions to alter or amend—"shall be filed no later than 10 days after entry of judgment," Fed. R. Civ. P. 59(b), (e), and most courts have concluded that the 10-day filing requirement is jurisdictional. . . . In other contexts, our own precedent dictates that a Rule 59 motion filed outside the mandatory 10-day window is of no effect.

Feather v. Chevron U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998) (citations omitted).

Final judgment entered in this case on July 26, 2000 [Doc. 357]. The instant motion was not filed until August 29, 2000, and therefore if construed as a Rule 59 motion, it is of "no effect."

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"Where a party's Rule 59 motion is not filed within the mandatory 10-day period, it is appropriate for a court to consider the motion as a motion pursuant to Rule 60 for relief from judgment." *Id.*[3] The standard for Rule 60 relief is considerably higher than for Rule 59 relief. *Id.* This court does not retain jurisdiction to decide a Rule 60(b) motion where a notice of appeal is filed before the court decides the motion. *Securities and Exchange Commission v. Johnson*, 143 F.3d 260, 263 (6th Cir. 1998); *Pittock v. Otis Elevator*

3. The pertinent part of Rule 60 provides:

> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Co., 8 F.3d 325, 327 (6th Cir. 1993). The defendants filed their notice of appeal on August 4, 2000 [Doc. 359].

The defendants' Rule 59 "motion to reconsider" will be denied.[4]

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4. The defendants contend that the court exceeded its authority by imposing an injunction on Mayor Ashe. The defendants cite *Hopper v. Euclid Manner Nursing Home. Inc.*, 867 F.2d 291 (6th Cir. 1989) for the proposition that it is an abuse of discretion to modify a judgment for the purposes of avoiding the harsh effects of a Rule 68 offer of judgment. First of all, Rule 68 itself provides that such offers cannot be considered when deciding any issue but costs. Secondly, it is suppositional on the defendants' part to assume that the court changed its position and imposed an injunction in order to avoid the operation of Rule 68 in this case. The court acted pursuant to a timely filed Rule 59(e) motion to alter or amend judgment and set out the reasons for reversing the April 25, 2000, decision denying injunctive relief. Memorandum Opinion filed July 26, 2000 [Doc. 356]. Although the value of injunctive relief must be considered when comparing the plaintiffs' recovery to the Rule 68 offers, *see* 13 *Moore's Federal Practice* § 68.07[3] (3d ed. 1998), the undersigned did not rely on the value of the injunction in rejecting the Rule 68 offers. The offers were simply too indefinite and vague to be binding. None of the reasons given by the court to support the injunction included the effect of an injunction on the Rule 68 offers. The defendants do not accept the fact that injunctive relief is appropriate under the facts and law of this case; rather, they speculate that the court's imposition of injunctive relief was a somewhat disingenuous effort to rescue plaintiffs from the effects of Rule 68. The defendants more or less publicly claimed "victory" through their attorneys shortly after the jury verdict was in because the size of the damage award was relatively small, because no punitive damages were awarded and publicly stated through one of their lawyers that

(Cont'd)

Appendix B

II. *The Plaintiffs' Motion for Attorneys' Fees and Associated Expenses*

A. *Background and Contentions*

The plaintiffs moved in a timely manner for an award of attorneys' fees and associated expenses on August 8, 2000. 42 U.S.C. § 1988(b); 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d).

The plaintiffs contend that they have incurred substantial attorneys' fees and expenses during the pendency of this case; that those fees and expenses were increased needlessly due to defendants' vexatious tactics, pretrial appeal, unsuccessful petition for rehearing on appeal, and unsuccessful petition for certiorari to the United States Supreme Court.

(Cont'd)

the jury was "wrong." They continue to characterize this lawsuit as one "where the **only** injury involved lateral transfers and denial of modest, quantifiable merit pay." *See, e.g.*, Affidavit of Robert H. Watson, Jr. [Attachment to Doc. 371] (emphasis added). These factors reinforce the need for injunctive relief in this case. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes **irreparable injury.**" *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1973) (emphasis added). Retaliating against public employees because they have exercised their First Amendment right to political association is no trivial matter under our Constitution and laws. The defendants also contend that the court exceeded its authority by granting to the plaintiffs injunctive relief which extends to all Knoxville firefighters. It is true that this was not a class action but no direct relief was granted to any class. The court had in *personam* and subject matter jurisdiction over the mayor and it is he who is enjoined.

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The plaintiffs point out that the jury found ten separate violations of the plaintiffs' civil rights by the defendants. They argue that they should recover their fees and expenses associated with proceedings before the City of Knoxville's Civil Service Merit Board. At the very least, they argue that the court should award those fees which were necessary to the preparation for trial and which were used to successfully prosecute their case (such as depositions, research, and discovery that would have had to occur in order to proceed with this lawsuit in any event).

The defendants oppose the fee petition on a number of grounds. They argue that the fee petition should be denied because it was not filed within 14 days of the court's April 25, 2000, order. Fed. R. Civ. P. 54(d). They concede, however, that the court has already ruled that the April 25 order was not a final, appealable order. Memorandum Opinion filed July 26, 2000 [Doc. 356]. The final appealable order in this case was filed July 26, 2000, and the instant petition for attorneys' fees and associated costs was timely filed on August 8, 2000 [Docs. 357, 362]. This contention is without merit.

Defendants next contend that plaintiffs are not entitled to attorneys' fees incurred during the civil service grievance hearing process; that plaintiffs are not entitled to any attorneys' fees or costs incurred after plaintiffs' rejection of defendants' Rule 68 offers; that even assuming defendants' Rule 68 offers do not bar plaintiffs' recovery of post-offer fees and/or costs, the plaintiffs are not entitled to post-trial attorneys' fees or costs or, alternatively, those fees and costs should be reduced to reflect their limited success on post-trial

issues; that plaintiffs are not entitled to attorneys' fees/costs in this action for work associated with a collateral suit filed in state court; the fee petition and request for associated expenses are unreasonable; and many of the expenses sought by the plaintiffs should be rejected. I will take the defendants' objections up in the order stated.

B. *Attorneys' Fees — Civil Service Proceedings*

The party seeking an award of fees has the burden of proof to establish entitlement to the fees. *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 242, 105 S.Ct. 1923, 1928 (1985).

The plaintiffs filed grievances with the City of Knoxville Civil Service Board before filing this suit. There is some dispute about why the grievance procedures were not completed. In any event, the grievances never made it to a hearing before a hearing officer. Plaintiffs William Potter, Frank Potter, Ken Scarbrough and William McGinnis filed grievances with the Knoxville Civil Service Board alleging that retaliatory actions had been taken against them on account of their non-support of Mayor Ashe in the 1995 election. Mr. Sharpe became involved in February, 1996 when he filed his grievance with the board alleging failure to promote him and denial of merit pay based upon political patronage.

The plaintiffs contend that a number of discrete tasks were undertaken during the administrative hearing which were essential to the overall preparation and success of this case. *See* Exhibits 1 and 2 to Doc. 362. The plaintiffs contend that the work undertaken by their attorneys during the

grievance process constituted crucial discovery and investigation which would have been necessary to prepare the complaint and prepare for trial whether or not the grievances had been filed.

Plaintiff Gary Sharpe claims that he should be awarded $3588.50 in attorneys' fees for "discrete tasks" associated with the grievance proceedings. The other plaintiffs claim $2H6.00 in attorneys' fees for such "discrete tasks."

In *New York Gaslight Club v. Carey*, 447 U.S. 54, 100 S.Ct. 2024 (1980), the court held that attorneys' fees could be awarded to a prevailing plaintiff for work performed pursuing a state administrative remedy "to which the complainant was referred pursuant to Title VII" of the Civil Rights Act of 1964. *Id.* at 71, 100 S.Ct. at 2034. The court noted that the complainant was required to pursue available state remedies under Title VII before going to federal court. *Id.* at 64-65, 100 S.Ct. at 2031. It is not disputed that in the instant case, the plaintiffs did not have to exhaust their civil service remedies before filing suit.

In *Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 105 S.Ct. 1923 (1985), the plaintiff, an African-American school teacher, sued the county school board under 42 U.S.C. § 1983 for allegedly discharging him on account of his race. He had pursued administrative remedies with an attorney before filing suit in federal court. The case was settled while pending in federal court but the district court and the Sixth Circuit would not allow the plaintiff his attorney fees which were generated pursuing the administrative claim. The Supreme Court affirmed.

It distinguished *Carey* by saying that the administrative remedies in a Title VII case are mandatory but § 1983 does not require exhaustion of remedies. *Id.* at 240-41, 105 S.Ct. at 1927. In the administrative hearing the plaintiff had sought to enforce teacher tenure rights created by state law and not rights under § 1983.

The court held that "[t]he time that is compensable under § 1988 is that 'reasonably expended *on the litigation.*'" *Id.* at 242, 105 S.Ct. at 1928 (emphasis in the original). The administrative proceedings concerning the plaintiff's tenure rights were not part of the § 1983 proceeding.

The court noted that the amount of attorney's fees to be awarded depends on the facts of each case. *Id.* The court left the door open for awarding attorney's fees to a prevailing plaintiff under § 1988 even where the administrative proceedings are not mandatory.

> Of course, some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed "on the litigation." Most obvious examples are the drafting of the initial pleadings and the work associated with the development of the theory of the case. . . . The petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement.

Id. at 243, 105 S.Ct. 1928-29 (footnote omitted). On the record before the court in *Webb*, the court was being asked to award attorney's fees for all administrative work regardless of whether it advanced the civil rights litigation. The court upheld the district judge's discretionary decision to deny attorney's fees for all of the administrative proceedings.

Counsel for the plaintiffs in the instant case, however, have done their homework. They have broken out discrete portions of the work done during the administrative process which they say supported the civil rights litigation. It must be remembered that unlike the *Webb* case, the plaintiffs' theory from the outset of the administrative proceedings has been that four of them were transferred in September, 1995 in retaliation for their exercise of their right under the First Amendment not to support Mayor Ashe. For example, William Potter's grievance filed October 2, 1995, stated that he had been transferred "as a result of my exercise of First Amendment rights. . . ." Defendants' Exhibit 202. Kenneth Scarbrough's grievance filed that same date complained that he had been transferred "because I supported Ivan Harmon in the last Mayor's race." Joint Exhibit 5.

Although the court has held that the September, 1995 transfer claims are barred by the statute of limitations, they would have been admissible as evidence relevant to the other claims.

The plaintiffs' attorneys have exercised billing judgment and have highlighted the discrete portions of their administrative work which supported this civil rights litigation. I have reviewed these entries and find that I have

no basis for disagreeing with the billing judgment of plaintiffs' counsel.

I find that under the particular facts of this case, the discrete tasks identified by plaintiffs' counsel fit the mold of work "both useful and of a type ordinarily necessary to advance the civil rights litigation. . . ." *Webb*, 471 U.S. at 243, 105 S.Ct. at 1928.

The fact that no resolution of the grievances was ever made does not mean that the compensation claimed here was not spent on the litigation. That, and whether the time spent was reasonable, are the keys. *Id.* at 242, 105 S.Ct. at 1928.

The defendants argue that plaintiffs must not believe that the work performed in connection with the civil service proceedings was useful or necessary to advance the civil rights litigation since plaintiffs duplicated most of the depositions after filing suit in this court. The defendants argue that plaintiffs engaged in time consuming, expensive discovery which duplicated all those "discrete tasks" for which the plaintiffs now want to collect attorney fees.

This argument goes to the overall question of which of the hours of attorney time were **reasonably** expended on the litigation. *See* 42 U.S.C. § 1988(b). That will be addressed below.

The plaintiffs will be allowed attorneys' fees for work performed during the administrative process as follows:

Gary Sharpe:	$3588.50
The other plaintiffs:	$2116.00

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C. *Rejection of the Rule 68 Offers*

For the reasons stated in Part I, above, and in the Memorandum Opinion filed July 26, 2000, the Rule 68 offers were not binding on plaintiffs and do not affect the plaintiffs recovery of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

D. *Post-Trial Attorneys' Fees and Costs*

The defendants argue that the following "post-trial" matters deserve special attention: (1) limited success with respect to injunctive relief, (2) no monetary damages with respect to the four separate 1995 transfers, (3) no prejudgment interest, (4) no front pay, and (5) denial of William Potter's Fair Labor Standards Act claim. Defendants argue that the injunction is of little value and point out that the court struck the damages awarded for the September, 1995 transfers, and plaintiffs lost on the other three claims. Thus, they argue, little or no attorneys' fees should be awarded for this work.

I will consider this aspect of defendants' objections in connection with the analysis of reasonableness of the fees and expenses requested for the entire litigation set out below in Part II. F. The case should not be divided into parts, including a "post-trial" segment. The trial was not over until the FLSA claim was tried non-jury and the post-trial motions were decided. Moreover, the court must look at the entire litigation in judging what attorneys' fees and expenses to award.

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There can be no doubt that plaintiffs are the "prevailing parties" in this litigation. They did not achieve complete success in this litigation but "the degree of the plaintiffs' success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for the fee award at all." *Texas State Teachers Assoc. v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (1989).

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement. . . . Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. . . . Otherwise the judgment or settlement cannot be said to affec[t] the behavior of the defendant toward the plaintiff. . . . Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and thereby transform the plaintiff into a prevailing party. . . . In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-112, 113 S.Ct. 566, 573 (1992) (several internal quotations omitted, citations

omitted). All five plaintiffs clearly meet this definition of "prevailing party." Even William McGinnis, who is retired from the Knoxville Fire Department, meets the definition because an award of nominal damages satisfies the test, *Farrar*, 506 U.S. at 112, 113 S.Ct. at 573. Moreover, he is a pensioner from the city and he prevailed on his claim for injunctive relief, thereby protecting him from possible retaliation through his pension status.

> Once civil rights litigation materially alters the legal relationship between the parties, the degree of the plaintiff's overall success goes to the reasonableness of a fee award. . . . Indeed, the most critical factor in determining the reasonableness of a fee award is the degree of success obtained. . . . We have already observed that if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.

Id. at 114, 113 S.Ct. at 574 (internal quotations and citations omitted).

For these reasons, plaintiffs' "post-trial" fees and expenses will not be considered separately from fees and expenses for the entire litigation.

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E. *Collateral Suit in State Court*

The plaintiffs filed suit in Knox County Chancery Court seeking the contemporaneous time records prepared by counsel for the city. The plaintiffs claim fees for the Chancery Court action in the amount of $2485.00 and costs for that action in the amount of $147.10. Exhibit 6 to Doc. 320.

The plaintiffs argue that they had to file suit because the city would not turn over the time records pursuant to a Freedom of Information request. The purpose of obtaining the billing records was to use them to try and illustrate that plaintiffs' fees are reasonable.

Plaintiffs cannot recover these fees and costs in this court. They had their chance to recover costs in the Chancery Court action. Whether attorneys' fees would be recoverable in that action is governed by state law. That was separate litigation from this civil rights litigation. "The time that is compensable under § 1988 is that reasonably expended *on the litigation.*" *Webb*, 471 U.S. at 242, 105 S.Ct. at 1928 (emphasis in original, internal quotations omitted).

This claim for attorneys' fees and other costs will be denied.

F. *The Reasonableness of the Fees Requested*

An attorneys' fee award must be "attuned to the degree of success obtained." *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-258 (6th Cir. 1993).

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In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court set forth considerable guidance for courts determining a "reasonable" fee. *Hensley* dealt with an award of attorney's fees pursuant to 42 U.S.C. § 1988.

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. . . .
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expanded." S. Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

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> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 433-434, 103 S.Ct. at 1939-40. In the instant case, all of the plaintiffs claims, with the exception of the FLSA claim, were closely related in the sense that they involved an over-arching claim that the defendants did what they did to retaliate against the plaintiffs for failing to support Mayor Ashe in the 1995 election and then retaliated against them for bringing their dispute to federal court.

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of

discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . .

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is

> lengthy and demands many hours of lawyers' services. Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. . . .
>
> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley, 424 U.S. at 435-437, 103 S.Ct. at 1940-1941.

The amount of the plaintiff's damage award at trial is not controlling in determining the amount of reasonable attorney's fees. *McHenry v. Chadwick*, 896 F.2d 184, 189 (6th Cir. 1990), citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686 (1986). In *McHenry*, *supra*, the court approved an award of attorney's fees that was more than five times the amount of damages awarded to Mr. McHenry. *See Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997) (Damages capped at $300,000 and attorney's fees of $430,752.28 awarded. No injunctive relief awarded), *cert. denied*, 119 S.Ct. 64 (1998); *Adcock-Ladd v. Secretary of Treasury*,

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__ F.3d __, No. 99-5414 (6th Cir., decided and filed June 15, 2000) (Title VII case in which $260,492.50 in attorney's fees were awarded, including approval of a $300 per hour rate for a Washington, D.C. lawyer for pretrial work and additional compensation for his work on appeal at that rate. The case settled for $320,810.07, but no injunctive relief granted); *see also Riverside*, 477 U.S. at 564-67, 106 S.Ct. at 2689-91 (Appellate court confirmed award in excess of $245,000 in attorneys' fees to civil rights plaintiffs who recovered $33,350 in damages); *Duckworth v. Whisenant*, 97 F.3d 1393 (11th Cir. 1996) (award of $162,209 in attorneys' fees was proper despite an award of $10,500 in compensatory and punitive damages); and Estate of *Borst v. O'Brien*, 979 F.2d 511, 516-17 (7th Cir. 1992) (attorneys' fee 47 times as great as damage award was held not excessive because the amount of the award, taken alone, did "not represent the full value achieved by litigation vindicating one's civil rights.").

In determining whether hours are reasonably billed,

> [t]he question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Woolridge v. Marlene Industries Corporation, 898 F.2d 1169, 1177 (6th Cir. 1990), *reh'g and reh'g en banc denied, id.*

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This is a case which should not be viewed as a series of discrete claims except that the FLSA claim will be treated as a discrete claim. The overriding issues were whether the defendants violated the plaintiffs' First Amendment rights to freedom of political association and then retaliated against them for pursuing their rights in federal court. The Fair Labor Standards Act claim was somewhat related to the plaintiffs' overall theory of the case in that plaintiffs claimed that Chief Potter was singled out for different treatment under the FLSA than others in the firefighters' division because of his failure to support the mayor. Nonetheless, I believe it should be treated as a discrete claim for purposes of attorneys' fees.

Although the plaintiffs did not prevail on some claims, *e.g.* the September, 1995 transfers, Gary Sharpe's promotion, William Potter's transfer to the firefighting division, the plaintiffs succeeded in their overall goal in proving that they had been singled out for unlawful discrimination and retaliation because they did not support the mayor in the 1995 election and because they went to federal court to vindicate their First Amendment rights. They were also ultimately successful in obtaining injunctive relief to protect those rights. The court must therefore focus on the significance of the overall relief obtained by the plaintiffs in relation to the hours reasonably expended on the litigation. *Hensley*, 424 U.S. at 435, 103 S.Ct. at 1940.

It is no small matter to "take on city hall," especially when one is a city employee or pensioner. The plaintiffs had to fight and scratch for every inch of ground they gained in this case. The defendants are represented by capable, highly competent counsel and almost every issue capable of being

contested was contested. The defendants moved for a severance and separate trials, there were two motions to dismiss, there was a motion to disqualify Ms. Sobieski and stay the proceedings, there was an unsuccessful interlocutory appeal, there was a petition for rehearing, there was a petition for certiorari, a motion to grant an interlocutory appeal on the statute of limitations issue, and a complicated jury trial over eleven trial days.

The Supreme Court in *Hensley* adopted the twelve-factor test set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

> These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (1) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

Reed v. Rhodes, 179 F.3d 453, 471 n.3 (6th Cir. 1999).

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Plaintiffs were represented by Sobieski, Messer and Associates in this litigation. It is a small firm and presently consists of three lawyers. Ms. Sobieski is an experienced civil rights attorney. The court in *Hudson v. Reno* recognized that she has an extensive background in civil rights litigation. 130 F.3d at 1208. *See* Affidavits of Wanda G. Sobieski and Diane M. Messer, Exhibit 8 to Doc. 362. Five associates and several law clerks have worked on this case since its inception in October, 1966. Undoubtedly, this case has precluded the law firm from taking some other cases. Many of the material witnesses in this case were under defendants' control and this necessitated difficult investigation and many depositions. The case is "undesirable" from the viewpoint that Mayor Ashe is a popular mayor who has been elected and re-elected by the citizens of Knoxville for four terms since he first ran in 1988. The plaintiffs and their attorneys assumed a considerable financial risk in seeing this case through to conclusion.

I find that the hourly rates claimed for Ms. Sobieski, her associates and law clerks are reasonable and customary for the Knoxville, Tennessee, area. *See* Affidavits of Wanda G. Sobieski, Diane M. Messer, Dean Hill Rivkin, Carol S. Nickle, and David Burkhalter II, Exhibits 8 and 9 to Doc. 362.

The defendants contend that any amount of attorneys' fees and costs and expenses ultimately awarded the plaintiffs should be reduced by one-fifth to reflect the fact that William McGinnis recovered only nominal damages of $1.00 and will not benefit from any grant of injunction relief since he is retired. Although a party who receives nominal damages may

be prevented from recovering his attorneys' fees, *see Farrar v. Hobby*, 506 U.S. at 115, 113 S.Ct. at 575, Mr. McGinnis was successful in obtaining injunctive relief which protects not only his interests but that of similarly situated employees. The Supreme Court has rejected a mathematical approach which would compare the total number of issues in the case with those actually prevailed upon. *Hensley v. Eckerhart*, 461 U.S. at 435 n.11. "For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice-versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Id.* Mr. McGinnis, like the other plaintiffs, proved that two of the defendants were guilty of violating his constitutional rights and he obtained injunctive relief. He is a pensioner from the City of Knoxville and therefore his retired status does not completely divorce him from concerns of future retaliation. The damages will not be reduced by one-fifth as requested by the defendants.

The defendants argue that plaintiffs' counsel have taken the position all along that liability in this case was clear. The defendants argue that Ms. Sobieski holds herself out as an expert in the field of civil rights litigation and defendants therefore question why her partner, her associates and her law clerks have performed many hours of unspecified "research" for which they now seek to charge the defendants tens of thousands of dollars. They also question why it was necessary to redepose all three of the defendants over six days and take 19 additional depositions. The defendants answer their own question by stating that the purpose was to run up attorneys' fees in this case.

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Attached as Appendix A is a listing of challenged items which were specifically set forth by the defendants. The undersigned has considered the challenges and the plaintiffs' response thereto and finds for the reasons stated in the appendix that a deduction from the total attorneys' fees in the amount of $37,728 is called for.

The award of attorneys' fees will also be reduced significantly to account for the limited success obtained by the plaintiffs. This is an "equitable adjustment" which may be made by reducing the award to account for plaintiffs' limited success. *Hensley*, 424 U.S. at 436-37, 103 S.Ct. at 1941.

A summary of the plaintiffs' success or lack of success on claims made in this case follows:

The following claims were submitted to the jury or the court:

Plaintiff Gary G. Sharpe

1. denial of promotion to fire officer in 1996;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Sharpe prevailed on nos. 3, 4 and 6 only and received $2500.00 in compensatory damages.

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Plaintiff William G. Potter

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. other adverse employment actions;
4. retaliation for filing the lawsuit;
5. compensatory damages;
6. punitive damages;
7. injunctive relief;
8. prejudgment interest; and
9. the FLSA claim.

Mr. Potter prevailed on nos. 4, 5 and 7 and was awarded $6500.00 in compensatory damages.

Plaintiff Kenneth F. Scarbrough

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Scarbrough prevailed on nos. 2, 3, 4 and 6 and was awarded $3250.00 in compensatory damages.

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Plaintiff Frank E. Potter

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. Potter prevailed on nos. 2, 3, 4 and 6 and was awarded $3750.00 in compensatory damages.

Plaintiff William McGinnis

1. 1995 transfer;
2. denial of merit pay for 1995 or 1996;
3. retaliation for filing the lawsuit;
4. compensatory damages;
5. punitive damages;
6. injunctive relief; and
7. prejudgment interest.

Mr. McGinnis prevailed on nos. 2, 3 and 6 and was awarded $1.00 in nominal damages.

I have not adjusted the lodestar (the number of hours reasonably expended on the litigation times a reasonable hourly rate) by some type of mathematical comparison of the total number of issues in the case with those actually prevailed upon. That would be error. *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). Rather, the summary of issues set

out above is useful in focusing on the appropriate inquiry in a case like this one which has in general, commonality of facts and legal theories, *i.e.*, the significance of the overall relief obtained by the plaintiffs in relation to the hours reasonably expended in this case. *Id.*

An injunction is actual relief on the merits which materially alters the legal relationships between the parties in a way that directly benefits the plaintiffs. *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir. 1999). The fact that plaintiffs were successful in obtaining injunctive relief certainly adds to the plaintiffs' level of success. The value of the rights vindicated goes beyond the actual award of compensatory damages. *McHenry*, 896 F.2d at 189. Nonetheless, where a plaintiff achieves only partial success "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941. *See, e.g.*, *Granzeier*, 173 F.3d at 578 (Approving an attorney's fee of only 33% of the lodestar where the plaintiffs achieved only limited injunctive relief).

In this case, the award will be reduced by 20% in order to take into account the limited success achieved.

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G. *Summary*

For the reasons indicated, the plaintiffs will be awarded their attorneys' fees as follows:

The total fees and costs requested (giving plaintiffs credit for discrete tasks only in connection with the administrative proceedings) is $357,775.20. Exhibit 10 to Doc. 362. From that will be deducted $37,728.00 for the reasons indicated separately on Appendix 2. That totals $320,047.20. From that amount will be deducted $2632.10 representing the fees and costs which are claimed in connection with the Chancery suit. From that amount ($317,415.10) will be deducted 10% of that total for duplication of effort. This is to take into account the number of separate attorneys that participated in preparation and trial of this case, the fact that several associates entered and left the case during the proceedings, and to take into account the fact that there was duplication of effort in that the plaintiffs repeated discovery that was done in connection with the grievance proceedings before the Civil Service Board. Reduction by 10% results in a figure of $285,673.59. From this figure will be deducted 20% of the total or $57,134.72 to take into account the fact that the plaintiffs did not achieve all of the goals of their lawsuit. This results in a total award of attorneys' fees and related expenses of $228,538.87, plus $2000.00 in attorneys' fees pursuant to the supplement filed September 12, 2000 [Doc. 375].[5] This results in a total award of $230,538.87.

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5. I have reduced the September 4, 2000, entry because the office conference between plaintiffs' attorneys is not compensable.

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III. *Plaintiffs' Motion to Strike the Affidavit of Robert L. Crossley*

The plaintiffs move to strike Mr. Crossley's affidavit as being untimely filed and as containing impertinent and irrelevant information subject to being stricken pursuant to Fed. R. Civ. P. 12(f).

I cannot conceive that the plaintiffs have been prejudiced in any way by the late filing of the affidavit and it will not be struck on that ground.

The plaintiffs contend that the contents of the affidavit are impertinent and irrelevant in that the bulk of it merely recites language apparently drafted by defense counsel and does not establish any personal knowledge of this litigation, the fee application, or the actual work performed. The plaintiffs point out that Mr. Crossley does not suggest that he has reviewed the bills for which he offers his opinion or any portion of the pleadings to determine the nature or quality of the work encompassed within the fee request. The plaintiffs also contend that Mr. Crossley is biased in favor of the defendants and plaintiffs especially object to paragraph 5 of the affidavit. That paragraph criticized Ms. Sobieski's billing judgment while she was an equity partner at the law firm of Baker, Worthington, Crossley, Stansberry & Woolf. This brought a firm rejoinder from Ms. Sobieski and an affidavit which is Exhibit A to Doc. 372.

Motions to strike pursuant to Rule 12(f) address themselves to pleadings. An affidavit is not a pleading. Fed. R. Civ. P. 7(a). Thus, the affidavit shall not be struck pursuant to Rule 12(f).

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The plaintiffs' objections to the affidavit raise questions about the weight to be given to its content but do not provide grounds for striking it. The motion to strike will therefore be **DENIED.**

IV. *COSTS*

Taxation of statutory discretionary costs is governed by 28 U.S.C. § 1920 which provides as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

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A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Costs will be taxed against the City of Knoxville, Mayor Ashe, and Mr. Cureton. They are not taxed against Mr. Pressley as he prevailed on all issues.

The plaintiffs seek $120.00 in filing fees. This is not contested.[6]

The plaintiffs seek court reporter fees for 19 depositions in the amount of $10,522.55 [Doc. 358]. The defendant objects to the August 7 and August 8, 1996, depositions taken of Mayor Ashe, Bruce Cureton, Jack Vandergriff, and Robert Pressley. The objection is that the depositions were taken before the lawsuit was filed. That is true, but the court has determined in Part II.B., above, that certain discrete tasks were accomplished by counsel for the plaintiffs before the lawsuit was filed that are compensable as costs. These depositions fall into that category but to account for duplication of effort, I will reduce the total claim for costs in connection with depositions nos. 1, 2, 5-8 by 25%. The total claim for these depositions was $4636.85. Accordingly, the plaintiffs' claim for court reporter fees will be reduced by $1159.21 for a total award of $9363.34.

Even though Mr. Pressley was not found liable, the taking of his deposition was certainly reasonable and necessary for preparation of the plaintiffs' civil rights case. Counsel for

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6. *See* Amended Itemization of Costs filed August 8, 2000 [Doc. 361].

the plaintiffs signed the following declaration in support of plaintiffs' claim for costs:

> I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to:
>
> The Court and Defendants' Attorneys

The defendants also object that plaintiffs are seeking $1035.61 in printing costs in connection with the plaintiffs' response to defendants' petition for certiorari. The plaintiffs responded that defendants included this item in their earlier bill of costs and claimed $2145.60 for it. The defendants' contention lacks merit. *See* 28 U.S.C. § 1920(4).

For the reasons indicated, statutory, discretionary costs are awarded to the plaintiffs and against the City of Knoxville, Mayor Ashe, and Mr. Cureton as follows:

Filing fee	$ 120.00
Court Reporters' Fees	9,363.34
Printing	1,035.61
Witness Fees	230.00
Total	$10,748.95

Appendix B

V. *SUMMARY*

For the reasons indicated, an order will enter denying the plaintiffs' motion to reconsider the July 26, 2000, Memorandum Opinion, granting the plaintiffs' motion for attorneys' fees and related expenses pursuant to 42 U.S.C. § 1988(b) in the amount of $230,538.87, denying plaintiffs' motion to strike the affidavit of Robert L. Crossley, and fixing costs against the City of Knoxville, Mayor Ashe and Mr. Cureton at $10,748.95.

Order accordingly,

FILE:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:96-cv-916
(MURRIAN)

GARY G. SHARPE, et al.,

Plaintiffs,

v.

FIRE CHIEF BRUCE CURETON, et al.,

Defendants.

ORDER

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is **ORDERED** that defendants' motion to reconsider the July 26, 2000, Memorandum Opinion be **DENIED**; that plaintiffs' motion for attorneys' fees and related expenses pursuant to 42 U.S.C. § 1988(b) be **GRANTED**, and such fees and expenses are fixed at $230,538.87; that plaintiffs' motion to strike the affidavit of Robert L. Crossley be **DENIED**; that statutory costs be fixed at $10,748.95; and that the attorneys' fees, related expenses and statutory costs be hereby awarded in favor of plaintiffs and against the City of Knoxville, Mayor Ashe and Mr. Cureton [Docs. 358, 362, 371, 372].

Appendix B

ENTER:

s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

Appendix B

Challenged Item	Defendants' Objection Overruled	Defendants' Objection Sustained in Whole or in Part	Reason	Amount Deducted
Jan. 5, 1996 Invoice Re: Research	X		This was not one of the discrete tasks claimed by the plaintiffs	N/A
April 2, 1996 Invoice Re: "spreadsheets re: bonus pay"	X		Variety of spreadsheets prepared; extensive record review; information used at trial	0
August 5, 1996 "Research Documents" 1.9 hours		X	Plaintiffs have not demonstrated how this was reasonable	1.9 hrs at $140/hr = $266.00
FLSA Claim Before Complaint Filed		X	The plaintiff, William Potter, was not successful on this claim	$1122.00
April 3, 1997 Invoice (This exhibit was not found in Exhibit 4 to Doc. 320) re: deposition summaries		X	Excessive at this stage of the lawsuit.	13 hours at $35/hr = $455.00
May 5, 1997 Invoice - re: exhaustion of remedies, office conferences		X	No explanation by plaintiffs why exhaustion of remedies research was necessary. Conference time was not claimed.	11 hours at $35/hr = $385.00

APPENDIX A

Appendix B

June 4, 1997 Invoice re: review of summary judgment motion		X	Law Clerks review of defendants' motion for summary judgment for 20-25 hours is excessive	12 hours at $35/hr = $420.00
July 7, 1997 Invoice re: 35+ hours for law clerk review of cases, etc.		X	Excessive	20 hours at $35/hr = $700.00
November 4, 1997 Invoice re: 2 attorneys at hearing, etc.	X		Reasonable	0
January 7, 1998 Invoice re: research	X		Reasonable	0
February 5, 1998 Invoice re: "review cases" and Westlaw		X	Excessive	3 hours at $150/hr = $450.00
May 5, 1998 Invoice re: associate and law clerk research		X	Excessive	5 hours at $110/hr and 4 hours at $50/hr = $750.00
October 2, 1998 Invoice re: research and travel time		X	Research of Sixth Circuit panel unexplained. Travel time compensated at $75/hr	7.2 hours at $150/hr = $1080.00
July 15, 1999 Invoice re: duplication		X	Duplication of effort- four attorneys working on response to certiorari brief	(A reduction for duplication is made elsewhere)